INDEX

Page

Subject Index

Table of Cases Cited

STATUTES CITED

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 833

W. L. SANDSTROM,

Petitioner,

vs.

CALIFORNIA HORSE RACING BOARD AND LOYD WRIGHT, DWIGHT D. MURPHY AND NION R. TUCKER, MEMBERS OF THE CALIFORNIA HORSE RACING BOARD,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

W. L. Sandstrom respectfully petitions, by his counsel, Joseph Scott, for a writ of certiorari to review a decision of the Supreme Court of the State of California, 31 Advance California Reports 410, and 189 Pac. (2d) 17, rendered February 3, 1948 (rehearing denied March 1, 1948), which reversed a judgment of the Superior Court of the State of California, in and for the County of Los Angeles,

ordering the issuance of a peremptory writ of mandate to compel respondents to cancel an order suspending petitioner's license to train race horses.

A

Summary Statement of the Matter Involved

Petitioner was a trainer of race horses, duly licensed by respondent board, which agency was created by a State statute ("Horse Racing Act," Cal. Stats., 1933, p. 2046). The Act expressly provided that the legislation in question should become effective only when the people ratified a constitutional amendment approving the same. Subsequently, the California Constitution was so amended (Sec. 25a, Art. IV, California Constitution). The Act further provided, among other things, that the license of a trainer should not "be revoked without just cause."

Rule 313, one of the rules and regulations thereafter promulgated by respondent board, provides that "The Trainer shall be the absolute insurer for the responsibility of the condition of the horse entered in the race, regardless of the acts of third parties."[1]

The urinalysis of a petitioner-trained horse, taken after the running of a scheduled race, disclosed the presence of a stimulant. After a hearing at which he was present, petitioner's license was suspended by virtue of the aforesaid Rule 313, although no evidence had been educed showing that petitioner, personally or through an agent or employee, had any knowledge of, or had in any way caused, or had anything to do with, the stimulating of the horse, or that he had been careless, negligent or indifferent in protecting the condition of the horse.

The trial court ordered petitioner's license to be restored, holding that Rule 313 was arbitrary, unreasonable and

[1] The full text of Rule 313 is in the record (R. 6).

capricious (R. 12). The California Supreme Court reversed the trial court, invoking the doctrine of "strict responsibility," and holding that Rule 313 was constitutional (R. 41-43).

B

Statement Disclosing Basis of Jurisdiction

I

1. Appellate jurisdiction is claimed under Section 237 (b) of the United States Judicial Code, as amended by the Acts of February 13, 1935, Ch. 295, 43 Stat. 937.

2. The judgment of the Supreme Court of California was entered February 3, 1948 (R. 38). Petition for rehearing, timely filed, was denied March 1, 1948 (R. 62).

II

The Administrative Regulation, the Validity of Which Is Involved

Involved herein is Rule 313 of the California Horse Racing Board, promulgated by that agency pursuant to the "Horse Racing Act" (Cal. Stats., 1933, p. 2046), which in turn was enacted for the purpose of regulating, licensing and supervising horse racing and wagering thereon.

By the aforesaid Act there was delegated to respondent board, among other things, "full power to prescribe rules, regulations and conditions under which all horse races, upon the results of which there shall be wagering, shall be conducted."

The Act expressly provided that the license of a trainer shall not "be revoked without just cause."

III

The Nature of the Case

The nature of the case has been stated (*ante*, page 2). In the trial court petitioner asserted that Rule 313 was arbitrary, unreasonable and capricious, and therefore unconstitutional (R. 2). These contentions were sustained by the trial court (R. 12). Upon appeal by the Board to the District Court of Appeal of California, the judgment of the trial court was reversed with directions (183 Pac. (2d) 285). Petitioner then sought a hearing in the California Supreme Court, renewing his contention that Rule 313 was arbitrary, unreasonable and capricious, and that its provisions violated the Fourteenth Amendment of the United States Constitution, and denied equal protection and due process of law. Upon taking jurisdiction of the cause (R. 37), the California Supreme Court held that Rule 313 did not violate the Fourteenth Amendment and reversed the judgment of the trial court (R. 49). There were two dissenting opinions (R. 50-62).

The conclusion of the California Supreme Court that the rule in question is neither unreasonable nor a denial of due process or equal protection of the law presents for determination a substantial Federal question relating to the extent of the authority exercised by a Statewide administrative agency. The criteria established by the Supreme Court of California and the application thereof to the rule in question are at variance with principles announced by this Court.

The following cases are believed to sustain jurisdiction:

Hamilton v. *Regents of University of California*, 293 U. S. 245, at 257 and 258;

New York ex rel. Bryant v. *Zimmerman*, 278 U. S. 63, at 67;

Whitney v. *California*, 274 U. S. 357, at 360.

C

The Question Presented

Broadly stated, the question presented is this:

Is Rule 313 of respondent board arbitrary, unreasonable and capricious, and therefore violative of equal protection and due process of law guaranteed by the Fourteenth Amendment?[2]

Stated more specifically:

1. Does Rule 313 of the California Horse Racing Board unconstitutionally deprive petitioner of equal protection and due process of law by denying a full hearing and a fair opportunity to rebut the charges against him?

2. May a legislative administrative board of Statewide jurisdiction, by a rule of its own promulgation, constitutionally impose upon a licensed race horse trainer absolute, or "strict" liability for the condition of a race horse when the trainer is without fault, guilty knowledge, participation, or culpable negligence or indifference?

3. Is Rule 313 *ultra vires* when the statute creating respondent board expressly provided that the license of a trainer shall not "be revoked without just cause"?

4. Does Rule 313 unconstitutionally set up a conclusive presumption?

D

Reason Relied on for the Allowance of the Writ

1. The due process clause of the Fourteenth Amendment sets limits upon the power of a State legislature and its creature agencies to make proof of one fact or group

---

[2] *Manley* v. *Georgia*, 279 U. S. 1, 7;
McFarland v. *American Sugar Ref. Co.*, 241 U. S. 79, 86;
Morgan v. *United States*, 304 U. S. 1.

of facts conclusive and irrebutable evidence of the existence of the ultimate fact on which guilt is predicated; if there be no rational connection between a proven fact and the ultimate fact conclusively presumed therefrom, the statute or administrative regulation is arbitrary and denies the due process of law guaranteed by the Fourteenth Amendment. *Tot* v. *United States,* 319 U. S. 463, 467; *Morrison* v. *California,* 291 U. S. 82; *Western & A. R. Co.* v. *Henderson,* 279 U. S. 639; *McFarland* v. *American Sugar Ref. Co.,* 241 U. S. 79.

2. The criterion applied in the State court in holding the rule to be constitutional is that "by express language the rule imposes strict liability for the condition of the horse" (R. 44). The State court relied on *City of Chicago* v. *Sturges,* 222 U. S. 313 (R. 41). Assuming the correctness of the test adopted, this Court nevertheless will inquire whether the test, as applied, denied the rights safeguarded by the Fourteenth Amendment.[3]

3. The "strict responsibility" test unduly restricts vital constitutional rights and privileges. The proper criterion is the "rational connection" test announced in *Mobile J. & K. C. Co.* v. *Turnipseed,* 219 U. S. 35, 43, and followed in *McFarland* v. *American Sugar Ref. Co.,* 241 U. S. 79, 86; *Manley* v. *Georgia,* 279 U. S. 1; and *Tot* v. *United States,* 319 U. S. 463. The State Supreme Court rejected this test and referred to *City of Chicago* v. *Sturges, supra,* in support thereof (R. 41). This Court should declare whether or not the "strict responsibility" test may be invoked to punish a licensee of a Statewide administrative agency in the complete absence of any showing that he had knowledge, personally or vicariously, of the prohibited act.

---

[3] *Nebbia* v. *New York,* 291 U. S. 502.

4. The ruling of the California Supreme Court conflicts with the conclusions reached by the appellate courts of Maryland, Florida and New York in the following cases:

Mahoney v. *Byers* (Md.), 48 A. (2d) 600;
State v. *Baldwin* (Fla.), 31 So. (2d) 627;
Smith v. *Cole*, 62 NYS (2d) 226.

These decisions all dealt with rules identical or similar to the rule in question. In view of the importance of the problem presented, it is necessary that this Court announce the criterion governing the right of a Statewide agency to control the activities of an occupation over which it has jurisdiction.

WHEREFORE, your petitioner prays that a Writ of Certiorari issue under the seal of this Court, directed to the Supreme Court of the State of California, to the end that this cause may be reviewed and determined by this Court as provided by the statutes of the United States; and that the judgment herein of said Supreme Court of the State of California be reversed by this Court; and for such other and further relief as to this Court may seem proper.

W. L. SANDSTROM,
Petitioner;

By JOSEPH SCOTT,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 833

W. L. SANDSTROM,

Petitioner,

vs.

CALIFORNIA HORSE RACING BOARD AND LOYD WRIGHT, DWIGHT D. MURPHY AND NION R. TUCKER, MEMBERS OF THE CALIFORNIA HORSE RACING BOARD,

Respondents

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Opinions Below

The majority opinion of the Supreme Court of California (R. 38-49) is reported in 31 Advance California Reports 410, and 189 Pac. (2d) 17. The dissenting opinions are reported in 31 Advance California Reports 422 *et seq.* There is an unreported opinion of the trial judge (R. 31-33).

II

Jurisdiction

The basis of jurisdiction is given under the heading "B" in the Petition for Writ of Certiorari (*ante*, page 3), and in the interest of brevity is incorporated herein by reference.

III

Summary Statement

A summary statement of the case appears under the heading "A" in the Petition for Writ of Certiorari (*ante*, page 2, and in the interest of brevity is incorporated herein by reference. A more extended statement appears in the argument (*post*, page 11).

IV

Specification of Errors

The California Supreme Court erred in ruling that:

1. Rule 313 of the California Horse Racing Board is constitutional.

2. The imposition by Rule 313 of strict liability is a valid exercise of the police power.

3. The legislature constitutionally delegated to the California Horse Racing Board the legislative power to enact Rule 313.

4. Rule 313 does not establish a conclusive presumption.

V

ARGUMENT

Summary of the Argument

Point 1

Rule 313 of the California Horse Racing Board violates the Fourteenth Amendment's guarantee of equal protection

and due process of law by denying a full hearing and a fair opportunity to rebut the charges made.

Point 2

A rule of a legislative administrative agency is an unconstitutional attempt to create a conclusive presumption when it substitutes an irrebutable presumption for facts necessary to show guilt, and precludes a party from showing the truth by making evidence conclusive which is not so by its nature.

Point 3

A legislative administrative agency cannot constitutionally impose absolute liability upon one without fault or blame, by exercising legislative powers which have not been granted, or which have been denied to it.

Point 1

Rule 313 of the California Horse Racing Board violates the Fourteenth Amendment's guarantee of equal protection and due process of law by denying a full hearing and a fair opportunity to rebut the charges made.

Early in 1933, the California Legislature adopted the Horse Racing Act[4] legalizing betting on horse racing. The Act itself expressly provided that it was to become effective only when ratified by constitutional amendment.

Subsequently, the constitution was so amended by the adoption of Section 25a, Article IV, which reads as follows:

> "The Legislature may provide for the regulation of horse races and horse race meetings and wagering on the results thereof. The provisions of an act entitled 'An act to provide for the regulation and licensing of horse racing, horse racing meetings, and the wager-

[4] Calif. Stats. 1933, p. 2046.

ing on the results thereof; to create the California Horse Racing Board for the regulation, licensing and supervision of said horse racing and wagering thereon; to provide penalties for the violation of the provisions of this act, and to provide that this act shall take effect upon the adoption of a constitutional amendment ratifying its provisions,' are hereby confirmed, ratified, and declared to be fully and completely effective; provided, that said act may at any time be amended or repealed by the Legislature."

The provisions of the Horse Racing Acts, and amendments thereto, have been codified by statute in the Business and Professions Code of the State of California. The pertinent code provisions are as follows:

"The board shall have all powers necessary and proper to enable it to carry out fully and effectually the purposes of this chapter.[5]

"All licenses, granted under this chapter are subject to all rules, regulations and conditions from time to time prescribed by the board and shall contain such conditions as are deemed necessary or desirable by the board for the purposes of this chapter.[6]

"No qualified person shall be refused a license under this article nor shall a license be revoked without just cause.[7]

"The board may prescribe rules, regulations and conditions consistent with the provisions of this chapter under which all horse races, upon the results of which there is wagering, shall be conducted within the State."[8]

Rule 313 of the California Horse Racing Board, in its applicable parts, reads as follows:

"The Trainer shall be the absolute insurer of and responsible for the condition of the horses entered in a

[5] Bus. & Prof. Code, Sec. 19420.
[6] Bus. & Prof. Code, Sec. 19460.
[7] Bus. & Prof. Code, Sec. 19513.
[8] Bus. & Prof. Code, Sec. 19561.

race, regardless of the acts of third parties. Should . . . analysis . . . prove positive showing the presence of any narcotic . . . the Trainer of the horse may be suspended or ruled off . . ."

The evidence educed at the hearing herein before the California Horse Racing Board established only the following facts:

1. Petitioner was a duly licensed trainer of a race horse entered in a race on which there was wagering.

2. After the race, the horse was found to have been stimulated by a caffeine type alkaloid.

No evidence was educed that petitioner or any of his agents or employees had any knowledge of or in any way had caused or had anything to do with the stimulating of the horse; or that he or his agents and employees had been careless, negligent or indifferent in protecting the condition of the horse. This is conceded by the California Supreme Court (R. 46-47), which predicates liability herein as follows:

> "Two factual elements must exist to bring the rule into operation; first, the licensee must be the trainer of the horse, and secondly, the analysis must show the presence of a stimulating or depressive drug or chemical . . . (R. 41). Fault in the sense of actual administration of the drug or negligent care by the trainer is neither the basis nor an element of liability. It may not be injected into the case by way of subtle hypothesis. Whether the trainer drugged the horse or knew that it was drugged, or was negligent in not properly seeing that the horse was not drugged are not elements of liability." (R. 44)

The dissenting opinion of Mr. Justice Carter most effectively points out the untenable position taken by the majority opinion (R. 51);

> "The majority opinion sustains as valid a rule of the California Horse Racing Board which imposes

liability without culpability—guilt without fault or knowledge that a wrong had been perpetrated or that the rule had been violated. Under this rule an innocent person may be condemned and punished without evidence that he did, or intended to do, or permitted to be done, any wrong whatsoever. In fact, this result could be obtained even if it were conclusively shown that such innocent person did everything possible to prevent the violation of such rule or was overpowered by a wrongdoer and rendered helpless while the unlawful act was being consummated. The exercise of vigilance, diligence, care, precaution and fidelity to duty honestly and faithfully performed is of no avail. The suspended axe falls and the innocent victim is decapitated. 'Oh! (justice), what crimes are committed in thy name.'

"In overruling the demurrer interposed by the California Horse Racing Board to the petitioner's petition in the trial court, the learned judge made the following comment:

"'. . . This Rule as written deprives the licensee in question of any possible defense to an attempt or threat of the Board to suspend his license once the presence of the proscribed narcotic was established. To deprive the trainer of his license under such circumstances would not be founded upon "just cause," and for that reason, the Rule as construed and applied by the Board in this case is arbitrary, unreasonable and capricious, and inconsistent with the provisions of the chapter on Horse Racing, particularly sections 19512 and 19513.'"

Continuing, the dissenting justice says (R. 52):

"In my opinion rule 313, as here applied, violates every precept of justice as established by the Constitution and laws of the United States and this State. It is unconstitutional and out of harmony with the American system of justice, and may appropriately be labeled as 'unamerican.' It cannot stand in the face of the long line of decisions of the Supreme Court of the United States which denounces such strictures on jus-

tice as a violation of the due process provisions of the Fifth and Fourteenth Amendments to the Constitution of the United States. (*Tot* v. *United States*, 319 U. S. 463 (63 S. Ct. 1241, 87 L. Ed. 1519); *Mobile J. & K. C. R. Co.* v. *Turnipseed*, 219 U. S. 35 (31 S. Ct. 136, 55 L. Ed. 78); *Bailey* v. *Alabama*, 219 U. S. 219 (31 S. Ct. 145, 55 L. Ed. 191); *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61 (31 S. Ct. 337, 55 L. Ed. 369); *Luria* v. *United States*, 231 U. S. 9 (34 S. Ct. 10, 58 L. Ed. 101); *McFarland* v. *American Sugar Ref. Co.*, 241 U. S. 79 (36 S. Ct. 498, 60 L. Ed. 899); *Manley* v. *Georgia*, 279 U. S. 1 (49 S. Ct. 215, 73 L. Ed. 575); *Western & Atlantic R. R. Co.* v. *Henderson*, 279 U. S. 639 (49 S. Ct. 445, 73 L. Ed. 884); *Morrison* v. *California*, 291 U. S. 82 (54 S. Ct. 281, 78 L. Ed. 664).)" (Emphasis supplied)

Point 2

A rule of a legislative administrative agency is an unconstitutional attempt to create a conclusive presumption when it substitutes an irrebutable presumption for facts necessary to show guilt, and precludes a party from showing the truth by making evidence conclusive which is not so by its nature.

Rule 313 makes a trainer "the absolute insurer of and responsible for the condition of the horses entered in a race, regardless of the acts of third parties" (R. 6).

In effect, Rule 313 by fiat says that if a horse is found to have been drugged it will be conclusively presumed that the trainer was responsible therefor.

A statute creating a presumption that is arbitrary or that operates to deny a fair opportunity to repel it violates the due process clause of the Fourteenth Amendment. Mere legislative fiat may not take the place of fact.[9]

The due process clauses of the Fifth and Fourteenth Amendments set limits upon the power of Congress or

[9] *Manley* v. *Georgia*, 279 U. S. 1.

that of a State legislature to make the proof of one fact or group of facts evidence of the existence of the ultimate fact on which guilt is predicated. A statutory presumption cannot be sustained if there is no rational connection between the fact proved and the fact presumed.[10]

The Florida Supreme Court held an identically worded rule of the Florida Racing Commission to be an unconstitutional denial of due process.[11] Similarly worded rules were likewise held unconstitutional in New York[12] and Maryland.[13]

The inevitable effect on Rule 313 is that of an unconstitutional conclusive presumption. The State legislature itself could not by statute establish such a conclusive presumption, and certainly an attempt by an administrative agency to do so can amount to no more than an abortive attempt to circumvent the mandate of the Fourteenth Amendment, and is subject to review by this Court if the guarantee of due process and equal protection of law is to be preserved.

Point 3

A legislative administrative agency cannot constitutionally impose absolute liability upon one without fault or blame, by exercising legislative powers which have not been granted, or which have been denied to it.

This argument is not based upon any claim of unlawful delegation of legislative power.[14] It is solely premised upon the unassailable proposition that it is a denial of due process of law for an administrative agency to exercise a

---

[10] *Tot* v. *United States*, 319 U. S. 463, 467;
McFarland v. *American Sugar Refining Co.*, 241 U. S. 79, 86;
Morrison v. *California*, 291 U. S. 82;
Heiner v. *Donnan*, 285 U. S. 312.

[11] *Florida ex rel. Paoli* v. *Baldwin*, — Fla. —, 31 So. (2d) 627.

[12] *Smith* v. *Cole*, 270 App. Div. 675, 62 N. Y. S. (2d) 226.

[13] *Mahoney* v. *Byers*, — Md. —, 48 A. (2d) 600.

[14] *Highland Farms Dairy* v. *Agnew*, 300 U. S. 608.

legislative power not only never granted, but in fact expressly denied to it. Thus, the legislative act which created respondent board expressly prohibited the revocation of a trainer's license "without just cause."[15]

A "just cause" necessarily is a fair and reasonable cause and there must be some rationally attributable fault or blame. Rule 313 of respondent board violates the Fourteenth Amendment because it authorizes the revocation of a trainer's license not only "without just cause," but even without fault, participation, guilty knowledge, negligence or culpable indifference. In fact, were a trainer to be gagged and bound and rendered physically helpless to prevent the drugging of a race horse in his care, the provisions of Rule 313 would make his license revocable.

The imposition of strict or absolute liability, even by statute, is an extraordinary exercise of the police power and a State legislature itself ordinarily can impose such liability only when there is some factual reason for attributing fault or blame. For a legislative administrative agency to impose strict liability by its own fiat would be most extraordinary even if the most plenary of police powers were delegated to it.

Not only was respondent board not delegated this plenary police power legislative authority, but such authority was expressly denied to it by the statutory limitation that a license may not be revoked "without just cause."

The exercise of police power must be reasonable and not capricious or arbitrary, and this restraint imposed upon legislation by the due process clauses of the Fifth and Fourteenth Amendments is the same.[16]

Rule 313 is patently an arbitrary usurpation of power and hence unconstitutional.[17]

---

[15] *Bus. & Prof. Code*, sec. 19513, supra.
[16] *Heiner* v. *Donnan*, 285 U. S. 312; *Coolidge* v. *Long*, 282 U. S. 58.
[17] *Lemieux* v. *Young*, 211 U. S. 489; *Booth* v. *Illinois*, 184 U. S. 425.

Conclusion

WHEREFORE, it is respectfully submitted that this petition for writ of certiorari should be granted.

JOSEPH SCOTT,
Counsel for Petitioner.

(6458)

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

STATUTES

TEXTBOOKS

IN THE

Supreme Court of the United States

October Term, 1947
No. 833

W. L. SANDSTROM,

Petitioner,

vs.

CALIFORNIA HORSE RACING BOARD and LOYD WRIGHT, DWIGHT D. MURPHY and NION R. TUCKER, Members of the California Horse Racing Board,

Respondents.

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

Respondent opposes the granting of a writ of certiorari herein upon the ground that no substantial Federal question is involved.

Petitioner's Claim of Jurisdiction.

Petitioner claims jurisdiction under Section 237(b) of the United States Judicial Code, 28 U. S. C. A. 344(b); and the asserted Federal question is the alleged repugnance to the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitu-

tion (Pet. for Certiorari, pp. 3, 5) of the rule of the California Horse Racing Board making the trainer the absolute insurer of and responsible for the condition of the horses entered in a race upon the result of which there shall be wagering.

The record in this case upon the claim of invalidity grounded on asserted repugnance to the due process clause of the Fourteenth Amendment is as indefinite as that mentioned in *People of State of New York v. Zimmerman*, 278 U. S. 63, 67-8, 49 S. Ct. 61, 63, 73 L. Ed. 184, and the petition in the State Court of first instance here, as in that case, while asserting that the rule in question "was 'unconstitutional,' contained no mention of any constitutional provision, state or federal."

However, in the hearing in the State Supreme Court it was held that the import of the rule here in question is to impose strict responsibility upon the trainer for the condition of the horse, and that Court stated that the question was whether strict liability for the condition of a race horse can be constitutionally imposed upon the trainer of the horse. [R. 41.]

After quoting from *City of Chicago v. Sturges*, 222 U. S. 313, 322, the State Court went on to hold [R. 42]: "That the imposition of strict liability whether by statute or judicial decision does not of itself contravene the due process clauses of the federal or state Constitutions may not be disputed."

Accordingly, we make no claim that this case does not come technically within the purview of Section 237(b). Our contention is that the Federal question here involved is so lacking in substance as not to warrant the issuance of this writ.

ARGUMENT.

Summary of Argument.

1. The Federal question must be so substantial as to require analysis and exposition for the purpose of determination.

2. The constitutionality of the right to impose strict liability is well established, and there is no conclusive presumption of evidence involved.

3. The rule in question is a reasonable exercise of the police power of the State.

4. A full and fair hearing was had by petitioner.

5. Maryland, Florida and New York decisions discussed.

6. Possible application to extreme cases is not criterion of reasonableness.

Federal Question Must Be Substantial.

The mere assertion by petitioner that the rule here involved, making a trainer "the absolute insurer of and responsible for the condition of the horses entered in a race, regardless of the acts of third parties," is so unreasonable, arbitrary and capricious that it violates the Fourteenth Amendment to the Federal Constitution does not necessarily require this Court to grant certiorari and to review the judgment of the State Court.

None of the cases cited by petitioner (Pet. for Certiorari p. 4) in support of jurisdiction treat of the substantiality of the Federal question involved.

It is not sufficient that a Federal question has been timely and properly raised in the State Court, that the

proper mode of review by the Supreme Court has been selected, and that the appeal or application for writ of certiorari has been properly perfected. The character of the Federal question involved in the cause is also a criterion of the Court's jurisdiction to review, and if the Federal question is found to be "unsubstantial" the Supreme Court may deny the petition for writ of certiorari.[1]

Mr. Chief Justice White said:[2] "that although . . . it be found that a question adequate, abstractly considered, to confer jurisdiction was raised, if it likewise appear that such question is wholly formal, is so absolutely devoid of merit as to be frivolous, or has been so explicitly foreclosed by a decision or decisions of this court as to leave no room for real controversy," the cause will be dismissed. "Mere allegation of a federal question" will not suffice. "There must be a real, substantive question on which the case may be made to turn, that is, a real and not a merely formal federal question is essential to the jurisdiction" of the Supreme Court.

If the questions presented are so wanting in substance as not to need further argument in view of previous decisions of this Court, certiorari will be denied.[3]

---

[1]Jurisdiction of the Supreme Court of the United States, Robertson & Kirkman, page 95; *Gaines v. Washington*, 277 U. S. 81, 87, 48 S. Ct. 468, 469, 72 L. Ed. 793; Rules Supreme Court, Rule 38, par. 5.

[2]*Equitable Life Assurance v. Brown*, 187 U. S. 308, 311, 23 S. Ct. 123, 124, 47 L. Ed. 190.

[3]*Boston v. Jackson*, 260 U. S. 309, 314, 43 S. Ct. 129, 131, 67 L. Ed. 274.

In essence the inquiry whether a substantial Federal question is involved in the given case is not to be distinguished from the question whether there is merit in the arguments advanced for the reversal of the judgment or decree sought to be reviewed. The test is said to be whether the question requires analysis and exposition for its decision.[4]

Constitutionality of Imposition of Strict Liability Is Well Established.

It is true that this Court has not heretofore passed upon the constitutionality of a rule making the trainer the absolute insurer of and responsible for the condition of the horses entered in a race upon the results of which there is wagering. We do submit, however, that the imposition of strict liability or guaranty has been so firmly established as not being repugnant to the due process clause of the Fourteenth Amendment that, as the State Supreme Court said, it is no longer open to dispute. The State Supreme Court in its decision [R. 42] cited numerous instances in which the imposition of strict liability had been sustained.

It is the contention of petitioner that such strict liability may not be constitutionally imposed when the trainer "is without fault, guilty knowledge, participation, or

---

[4]Jurisdiction of the Supreme Court, *supra*, p. 97; *Milheim v. Moffat Tunnel etc.*, 262 U. S. 710, 716, 717, 43 S. Ct. 694, 696, 67 L. Ed. 1194; *Hodges v. Snyder*, 261 U. S. 600, 601, 43 S. Ct. 435, 67 L. Ed. 819.

culpable negligence or indifference." (Pet. for Certiorari p. 5.)

We are concerned at this stage of the proceedings only with whether the asserted repugnance of the rule in question to the Fourteenth Amendment in the light of the California Supreme Court determination requires analysis and position for decision now, or whether the principle of law involved has been thoroughly established by the decisions of this Court.

Petitioner makes no attempt to contravene, discuss, or question the proposition stated by the Supreme Court of California [R. 42] that the imposition of strict liability does not of itself contravene the due process clauses of the constitution, nor does he mention any of the cases cited in support of that proposition other than to merely make reference to the case of *City of Chicago v. Sturges,* 222 U. S. 313. (Pet. for Certiorari p. 6.)

Petitioner relies for support in his appeal to this Court solely upon the proposition that the Legislature may not declare an individual guilty or presumptively guilty of a crime, nor may it make proof of one fact or group of facts conclusive evidence of the existence of the ultimate fact on which guilt is predicated, if there be no rational connection between such proven fact and the ultimate fact.

In support of his contention that the rule in question is repugnant to the Fourteenth Amendment, petitioner cites a line of authorities having to do with the proposition of making proof of one fact prima facie or conclusive evidence of the ultimate fact upon which guilt is predicated, but having nothing to do with the constitu-

tionality of the imposition of strict liability.[5] Those cases recognize, as stated in the *Turnipseed* case, that "Legislation providing that proof of one fact shall constitute

---

[5]*Manley v. Georgia,* 279 U. S. 1, 7, 49 S. Ct. 215, 217, 73 L. Ed. 575 (Georgia statute declared every bank insolvency to be fraudulent and made president and directors subject to imprisonment and labor for from 1 to 10 years);

McFarland v. American Sugar Refining Co., 241 U. S. 79, 86, 36 S. Ct. 498, 501, 60 L. Ed. 899 (Louisiana statute made any person who systematically paid less for sugar in Louisiana than he paid elsewhere *prima facie* guilty of monopoly or conspiracy in restraint of trade);

Tot v. United States, 319 U. S. 463, 63 S. Ct. 1241, 87 L. Ed. 1519 (Federal Firearms Act made possession of a firearm by anyone theretofore convicted of a crime of violence presumptive evidence that such firearm was transported in interstate commerce and in violation of the Act);

Morris v. California, 291 U. S. 82, 54 S. Ct. 281, 78 L. Ed. 664 (California Alien Land Law provided that when prosecution had established the acquisition, possession or transferring of real property by or to defendant and the indictment alleged defendant's ineligibility to United States citizenship, the burden of proving such eligibility thereupon devolved upon the defendant). Compare this with *Morrison v. California,* 288 U. S. 591, 53 S. Ct. 401, 77 L. Ed. 970, where court sustained an earlier provision of the same law providing that when it was proved that defendant had been in the use or occupation of real property and also proved that he was a member of a race ineligible to citizenship, the burden then should rest upon defendant of proving citizenship as a defense.

Western etc. R. R. Co. v. Henderson, 279 U. S. 639, 49 S. Ct. 445, 73 L. Ed. 884 (Georgia statute made proof of collision and resulting death a presumption that the railroad and its employees were negligent and that every act or omission in the specifications of negligence was the proximate cause of the death and making the railroad company liable unless it showed due care in respect of every matter alleged against it).

Mobile etc. R. R. v. Turnipseed, 219 U. S. 35, 31 S. Ct. 136, 55 L. Ed. 78 (Mississippi statute made proof of injury inflicted by running of locomotives or cars *prima facie* evidence of the want of reasonable skill and care on the part of the railroad).

Heiner v. Donnan, 285 U. S. 312, 52 S. Ct. 358, 76 L. Ed. 772 (Federal Revenue Act of 1926 provided that every transfer made within two years prior to the death of the decedent shall be deemed and held to have been made in contemplation of death).

prima facie evidence of the main fact in issue is but to enact a rule of evidence, and quite within the general power of government." The criterion, as stated in the *Manley* case, is said to be whether there is a rational connection between what is proved and what is to be inferred. "If the presumption is not unreasonable and is not made conclusive of the right of the person against whom raised, it does not constitute a denial of due process of law."

This line of authorities is particularly applicable to the rule involved in the Maryland case of *Mahoney v. Byers*, ... Md. ....., 48 Atl. (2d) 600. The rule there did not impose strict liability upon the trainer and make him the insurer or guarantor of the sound condition of the horse. It made the offense consist of the administration, or of knowingly or carelessly permitting the administration, of a drug to the horse, and then went on to provide that the presence of the drug should be conclusive evidence either that there was knowledge of the fact on the part of the trainer or that he was guilty of carelessness in permitting it to be administered.[6]

---

[6]Rule 146, Maryland Racing Commission, 48 Atl. (2d) 602:

"(a) No person shall administer, or knowingly or carelessly permit to be administered to any horse entered for a race, any drug in any way within forty-eight hours before the time of the race.

"(d) If the commission finds from an analysis of the saliva or urine, or blood taken from a horse on the day of a race in which the horse ran, or from other competent evidence, that any drug has been administered to the horse within forty-eight hours before the race, the trainer shall be subject to the penalties prescribed in subsection (e) hereof, whether or not he administered the drug, or knowingly or carelessly permitted it to be administered. The fact that the analysis shows the presence of a drug shall be conclusive evidence either that there was knowlege of the fact on the part of the trainer or that he was guilty of carelessness in permitting it to be administered."

Rule Is Reasonable Exercise of Police Power.

The guaranty of due process, which is all that we are here concerned with, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained.[7]

Where the legislative action is within the scope of the police power, fairly debatable questions as to its reasonableness, wisdom, and propriety are not for the determination of courts, but for that of the legislative body on which rests the duty and responsibility of decision.[8]

That the mere imposition of strict liability does not of itself contravene the due process clauses of the Federal Constitution and is not unreasonable, arbitrary or capricious, is well exemplified by the decisions cited in the opinion of the State Supreme Court [R. 42], as well as by the fact that petitioner has cited no authority to the contrary.

This Court has sustained the Workmen's Compensation Act against this same attack that it makes a person liable without regard to any neglect or fault on his part and notwithstanding that it abrogates common law defenses and holds a person liable or guilty irrespective of fault or agency.[9]

---

[7]16 C. J. S. 1162-3; *Treigle v. Acme Homestead Association*, 297 U. S. 189, 197, 56 S. Ct. 408, 80 L. Ed. 575; *Nebbia v. New York*, 291 U. S. 502, 537-8, 54 S. Ct. 505, 516, 78 L. Ed. 940.

[8]*Standard Oil Co. v. Marysville*, 279 U. S. 582, 584, 49 S. Ct. 430, 73 L. Ed. 856.

[9]*New York etc. R. R. Co. v. White*, 243 U. S. 188, 37 S. Ct. 247, 250, 253-4, 61 L. Ed. 667; *Arizona Copper Co. v. Hammer*, 250 U. S. 400, 39 S. Ct. 553, 63 L. Ed. 1058; *Ward & Gow v. Krinsky*, 259 U. S. 503, 42 S. Ct. 529, 66 L. Ed. 1033; *Cudahy Packing Co. v. Paramore*, 263 U. S. 418, 422, 44 S. Ct. 153, 154, 68 L. Ed. 366; 16 C. J. S. 1290.

A state law which permitted issuance of a motor vehicle operator's license to a minor only when the application therefor was signed by such minor's father, mother, guardian or employer and which made such signer liable with the minor for the latter's negligence when driving has been upheld as not repugnant to the Fourteenth Amendment, particularly as against the attack that such liability without fault may not be imposed.[10]

The Fourteenth Amendment protects the citizens in their right to engage in any lawful business, but it does not prevent legislation from prohibiting or regulating any business which is inherently vicious and harmful.[11]

It is to be noted that this case has to do with, and the rule here involved applies only to, horse racing "on the result of which there is wagering."[12]

It has long been thoroughly established that gambling in the various modes in which it is practiced is one of those occupations the tendency of which as shown by experience is to weaken or corrupt the morals of those who follow it, or to encourage idleness instead of habits of industry, and is thus demoralizing in its tendencies, and therefore an evil which the law may rightfully suppress without interfering with any of those inherent rights of citizenship which it is the object of government to protect and secure.[13]

---

[10]*Bispham v. Mahony* (Del.), 6 W. W. Harr. 318, 175 Atl. 320.

[11]*Murphy v. California,* 225 U. S. 623, 628, 32 S. Ct. 697, 56 L. Ed. 1229; *Adams v. Tanner,* 244 U. S. 590, 596, 37 S. Ct. 662, 665, 61 L. Ed. 1336.

[12]California Business and Professions Code, Secs. 19420, 19561.

[13]*Ex parte Tuttle,* 91 Cal. 589, 590-1, 27 Pac. 933.

This Court in rejecting an attack upon the constitutionality of an Ohio law making the real property which the owner knowingly permits to be used for gaming purposes liable for the payment of a judgment obtained by one of the participants against another participant in the gambling for money lost in play, said: "For a great many years past gambling has been very generally in this country regarded as a vice to be prevented and suppressed in the interest of the public morals and the public welfare. The power of the State to enact laws to suppress gambling cannot be doubted, and, as a means to that end, we have no doubt of its power to provide that the owner of the building in which gambling is conducted, who knowingly looks on and permits such gambling, can be made liable in his property which is thus used, to pay a judgment against those who won the money, as is provided in the statute in question. . . . The plain object of this legislation is to discourage and, if possible, prevent gambling. The liability of the owner of the building to make good the loss sustained under the circumstances set forth in the statute was clearly part of the means resorted to by the legislature for the purpose of suppressing the evil in the interest of the public morals and welfare. We are aware of no provision in the Federal Constitution which prevents this kind of legislation in a State for such a purpose."[14]

We submit that the only basis for review in this Court of the judgment in this case must rest upon the probability, or at least the possibility, that the rule here involved has no real and substantial relation to the object

---

[14]*Marvin v. Trout,* 199 U. S. 212, 224-5, 26 S. Ct. 31, 34, 50 L. Ed. 157.

sought to be attained and is therefore so unreasonable, arbitrary, and capricious as to be in violation of the Fourteenth Amendment.

Our position is that the rule is so clearly and directly related to the object sought to be attained and so patently reasonable as to require no analysis or exposition to determine that it is *not* repugnant to the Fourteenth Amendment.

We believe that it will necessarily be conceded that it is not only "reasonable," but that it is highly desirable, if not absolutely essential, to require that every horse entered in a race upon which the public is invited to wager must be in sound condition and absolutely free from any artificial stimulant or depressant.

If it be conceded, as we think it must be, that it is in the interest of the wagering public and the continued welfare of regulated horse racing to insure that the horses entered in such races are in sound condition and to insure that there is no artificial stimulation or depression of any such horses, then we submit that it is not only reasonable but that it is highly logical and essential that someone be made absolutely responsible for the sound condition of such horses. That the trainer, who is the one person in constant charge, custody and control of the horses under him, should be the person to be held responsible for their sound condition follows inevitably.

The very fact that such a provision has been in force and effect in this State ever since the inception of horse racing under the 1933 Act and has been accepted with-

out question during all of this time by those engaged in horse racing in this State certainly sets an impressive seal of "reasonableness" upon this rule.

The further fact that the Jockey Club of New York, recognized nationally and internationally as the parent organization of horse racing in North America, has enforced a similar provision for many years lends overwhelming weight to the "reasonableness" of this rule.

The license issued to a trainer applies only to his occupation upon race tracks where wagering on the results is permitted by the State. It is a privilege granted by the State and not an inherent right.

Asserted "unreasonableness" can hardly be predicated merely upon the fact that the rule imposes strict liability on the trainer for something which may occur without his knowledge or participation. That the obligation of a guarantor of the sound condition of his horse thus placed upon a trainer will stimulate him to far greater care and closer supervision over the condition of such horse than would be the case if he were responsible only in the event that he, himself, administered a stimulant or depressant or participated in the same cannot be gainsaid.

This Court has said that the standards of reasonableness to which an administrator's action must conform are to be found in the terms of the Act construed and applied in the light of its purpose.[15]

---

[15]*Federal Security Administrator v. Quaker Oats,* 316 U. S. 218, 232, 63 S. Ct. 597, 87 L. Ed. 724, 732.

Full and Fair Hearing Had.

Petitioner claims that he was denied the full hearing and the fair opportunity to rebut the charges made guaranteed by the Fourteenth Amendment. (Pet. for Certiorari, Point I, p. 11.) However, nowhere in his petition filed in the State Court of first instance does petitioner allege that he was denied any right to present evidence, or that any evidence whatsoever which he offered was excluded or rejected, nor that he was denied a reasonable opportunity to know the claims of the opposing party, or that he did not in fact know such claims. On the contrary, he specifically alleges that a hearing was duly held pursuant to notice therefor given, and at which petitioner was personally present, and evidence both oral and documentary was offered and received. [R. 1-2, par. III.]

A transcript of petitioner's hearing before the California Horse Racing Board, consisting of some 42 pages, was a part of the record in these proceedings in the State Court [R. 39], but for some reason petitioner has not made it a part of the record in this Court. This transcript discloses that petitioner was there in person, that at the outset of the hearing he was cautioned about proceedings without the benefit of counsel, but that he elected to do so and expressed himself as thoroughly satisfied to represent himself. This transcript shows full and ample evidence to substantiate the order made by the Board. It shows that petitioner was given every opportunity and did present everything that he desired to offer and that he took advantage of cross-examining at length some of the witnesses placed upon the stand. It also discloses that at the suggestion of the Board, itself, petitioner placed in evidence his own statement that he did not personally

administer the drug to the horse, nor give any instructions to anyone to do so and knew nothing about it.

Actually it is not the lack of a full and fair hearing and an opportunity to know and rebut any charges made of which petitioner complains, but rather because the fact that he personally did not administer the drug or did not knowingly participate in such administration was not accepted as a *complete* defense to the breach of the rule in question.

Maryland, Florida, and New York Decisions.

Petitioner makes the statement that the ruling of the California Supreme Court in this case conflicts with the conclusions reached by the Appellate Courts of Maryland, Florida and New York.[16]

As we have already said the Maryland rule was decidedly different from the one here involved in that it made the administration of the drug the offense rather than merely holding the trainer as being the absolute insurer or guarantor of the sound condition of the horse entered in the race.

Florida's Rule 117, insofar as pertinent here, is identical with that of the California Horse Racing Board. Florida, however, also has another Rule No. 109 which is to the same effect as California's Penal Code Section

---

[16]Petition for Certiorari, p. 7; *Mahoney v. Byers,* ..... Md. ....., 48 Atl. (2d) 600; *State v. Baldwin,* ..... Fla. ....., 31 So. (2d) 627; *Smith v. Cole,* 62 N. Y. Supp. (2d) 226.

337(f). Apparently in a strained effort to follow the Maryland case, the Florida court held that in effect Rule 117 "provides that proof of the fact that a horse entered in a race has been administered a drug shall constitute irrebuttable evidence that the trainer has violated Rule No. 109. This is the reason why Rule No. 117 violates the due process clause of both our State and Federal Constitutions." It is interesting to note that the Florida court first by a four to three decision upheld the validity of the rule and then reversed itself by a similar four to three division holding the rule unconstitutional. In view of the well known presumption of constitutionality, in view of the presumption of the existence of facts justifying the rule,[17] in view of the principle that debatable questions as to reasonableness are not for the court but for the legislature,[18] and in view of the long standing existence and enforcement of this rule, the fact that the State of Florida considered the "reasonableness" of such a rule to be so finely balanced that it split four to three first one way and then the other does not, we submit, support any asserted "unreasonableness," "capriciousness," or "arbitrariness" of this police power measure to the extent of rendering it repugnant to the Fourteenth Amendment.

---

[17]*Pacific States Box & Basket Co. v. White,* 296 U. S. 182, 185, 186, 56 S. Ct. 163, 80 L. Ed. 148.

[18]16 C. J. S. 569; *Wholesale Tobacco, etc. v. National & Co.,* 11 Cal. (2d) 634, 650, 82 P. (2d) 3; *Standard Oil Co. v. Marysville, supra,* 279 U. S. 582, 49 S. Ct. 430, 73 L. Ed. 856.

Extreme Cases Not Criterion.

Petitioner urges that the rule here involved authorizes the revocation of the trainer's license even though he were gagged, bound and rendered physically helpless while some one else administered the drug.[19]. The revocacation or suspension of the license rests in the sound discretion of the Board. That the Board takes due cognizance of mitigating circumstances is evidenced by its action in the instant case suspending the license for a period of six months only, and approximately only four months have to run after its order was made. [R. 1-2.]

"A possible application to extreme cases is not the test of the reasonableness of public rules and regulations" when tested by the Fourteenth Amendment.[20]

Petitioner asserts that this violates the provision of the State statute[21] expressly providing that no license shall be revoked without just cause. This has been decided by the State Court and is not a Federal question.

---

[19]Petition for Certiorari, p. 17.

[20]*Lemieux v. Young*, 211 U. S. 489, 493, 29 S. Ct. 174, 175, 53 L. Ed. 295.

[21]California Business & Professions Code, Sec. 19513.

Conclusion.

We submit that the constitutionality of the imposition of strict liability is so well established and that the reasonableness of the rule in question in relation to the object sought to be attained is so manifest that it requires no further exposition or analysis to determine the same, and the writ herein may well be denied.

Respectfully submitted,

FRED N. HOWSER,
Attorney General of the State of California,

WALTER L. BOWERS,
Assistant Attorney General,

Attorneys for Respondent.